No. 12961.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

ADAMANT COMPANY, WALTER B. SCOVILLE, JOE SEEPLE, HARRY WYNN, HERSCHEL BULLEN, MARY N. BULLEN, J. C. HAYWARD and MARY S. HAYWARD; RECONSTRUCTION FINANCE CORPORATION, as Assignee of Treasure Company,

Appellees.

UNITED STATES OF AMERICA for the Use of RECONSTRUCTION FINANCE CORPORATION, a Federal Corporation, Acting in Behalf of DEFENSE PLANT CORPORATION, a Federal Corporation,

Appellant,

vs.

ADAMANT COMPANY, WALTER B. SCOVILLE, JOE SEEPLE, HARRY WYNN, HERSCHEL BULLEN, MARY N. BULLEN, J. C. HAYWARD and MARY S. HAYWARD,

Appellees.

(Continued on Inside Cover.)

Appellants' Adamant Company, Walter B. Scoville, Joe Seeple and Harry Wynn, Opening Brief.

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RECONSTRUCTION FINANCE CORPORATION, Solely as Assignee of Treasure Company,

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vs.

ADAMANT COMPANY, WALTER B. SCOVILLE, JOE SEEPLE and HARRY WYNN; HERSCHEL BULLEN, MARY N. BULLEN, J. C. HAYWARD and MARY S. HAYWARD, and UNITED STATES OF AMERICA,

Appellees.

THE ADAMANT COMPANY, a Corporation, WALTER B. SCOVILLE, JOE SEEPLE and HARRY WYNN,

Appellants,

vs.

UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE CORPORATION, HERSCHEL BULLEN, MARY N. BULLEN, J. C. HAYWARD and MARY S. HAYWARD,

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HERSCHEL BULLEN, MARY N. BULLEN, J. C. HAYWARD and MARY S. HAYWARD,

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Appellees.

Appellants' Adamant Company, Walter B. Scoville, Joe Seeple and Harry Wynn, Opening Brief.

Points on Appeal.

This is an appeal by the Adamant Company, Walter B. Scoville, Joe Seeple and Harry Wynn from certain portions of the Findings and Judgment in the above entitled case.

This brief maintains that the trial court failed to allocate the funds of the jury award in the correct and proper proportion, to these appellants and other claimants.

This brief maintains that these appellants had an equitable lien against any sums of money allocated by the trial court to the Treasure Company or its belated assignee, the Reconstruction Finance Corporation.

Jurisdiction.

An act of Congress, approved January 22, 1932 (U. S. C. 601-617 as amended), and Public Law 507, 77th Congress, approved March 27, 1942, and Executive Order 9217 issued by the President of the United States on August 7, 1942, by virtue of and pursuant to authority vested in him by Title II of the Second War Powers Act, 1942, approved March 27, 1942 (Public Law 507, 77th Congress), which Acts and Executive Order author-

ize the Reconstruction Finance Corporation to acquire by condemnation property deemed necessary for military, naval or other war purposes.

The United States Attorney for the Southern District of California filed a Complaint in Condemnation in the United States District Court for the Southern District of California, Central Division, before the Honorable Campbell E. Beaumont, United States District Judge, on September 28, 1942. [R.* p. 3.]

The Adamant Company, Walter B. Scoville and Harry Wynn filed an answer to said Complaint in Condemnation on December 8, 1943 [R. p. 14], in which answer the Adamant Company alleged its ownership of a 25 per cent participating royalty interest in certain leaseholds being condemned, and *also alleged* that it had acquired a further interest in the leaseholds amounting to 25 per cent of the production of $205,411.68, being the value of oil and gas produced by Treasure Company, whose interests were being condemned. [R. p. 19.]

And in which answer Walter B. Scoville alleged his ownership of a 17 per cent participating royalty interest in certain leaseholds being condemned, and *also alleged* that he had acquired a further interest in the leaseholds amounting to 17 per cent of the production of $205,411.68, being the value of oil and gas produced by the Treasure Company, whose interests were being condemned. [R. pp. 20-22.]

And in which answer Harry Wynn alleged his ownership of a 6 per cent participating royalty interest in cer-

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*The references preceded by "R" are to the printed record on appeal herein.

tain leaseholds being condemned, and *also alleged* that he had acquired a further interest in the leaseholds amounting to 6 per cent of the production of $205,411.68, being the value of oil and gas produced by the Treasure Company whose interests were being condemned. [R. pp. 22-23.]

The jury trial was heard on April 19, 20, 21, 22, 27, 28, 29 and May 4, 5, 6, 9, 10, 11, 12 and 13, 1949 and a judgment upon the verdict of the jury was entered July 13, 1949.

Section 258a of 40 U. S. Code Anno., provides in part:

> "* * * and the right to just compensation for the same shall vest in the persons entitled thereto, and said compensation shall be ascertained and awarded in said proceedings and established by judgment therein, * * *,"

and pursuant to said section the Adamant Company, Walter B. Scoville and Harry Wynn petitioned for distribution to them of the respective amounts due them in the condemnation award made by the jury, said petition was filed in the District Court on February 3, 1950. [R. p. 79.]

On February 11, 1950, Joe Seeple filed his petition for distribution of compensation for the amount due him and pursuant to said Statute, 40 U. S. Code Anno. 258a. [R. p. 96.]

That the United States Government, Reconstruction Finance Corporation, Treasure Company, Mr. and Mrs. Bullen and Mr. and Mrs. Hayward did not file any petition for distribution of compensation in the condemnation award made by the jury.

A trial was had before the Honorable Harry C. Westover, Judge Presiding, sitting without a jury, on May

10, 11, 12 and 16, 1950, for the determination and the allocation of the fund of $194,500.00, being the award by the jury in the foregoing condemnation action and designated by the jury as the value of "the total working interests in Treasure Company Well, Treasure No. 8."

Findings of Fact and Conclusions of Law and Judgment were signed by the Honorable Harry C. Westover, and Judgment entered October 30, 1950, in Book 68, page 720 of Judgments of the District Court.

Notice of Intention to Move for a New Trial by Bullen and wife, and Hayward and wife was filed November 8, 1950. [R. p. 156.]

Notice and Motion for New Trial was filed by The Adamant Company, Walter B. Scoville, Joe Seeple and Harry Wynn (these appellants), November 9, 1950. [R. p. 158.]

Motion to Set Aside Findings of Fact and Conclusions of Law and Judgment and for a New Hearing was filed by the Reconstruction Finance Corporation November 9, 1950. [R. p. 168.]

Motion to Vacate and Set Aside Findings and Judgment was filed by the United States of America on November 13, 1950. [R. p. 174.]

All of the above motions were denied December 11, 1950.

Notices of Appeal were filed by the plaintiff, the United States of America, on January 3, 1951, and on January 8, 1951. [R. pp. 185, 187.]

Notice of Appeal was filed by these appellants, The Adamant Company, Walter B. Scoville, Joe Seeple and Harry Wynn, on January 9, 1951. [R. p. 189.]

Notice of Appeal was filed by Reconstruction Finance Corporation on January 10, 1951. [R. p. 188.]

Notice of Appeal was filed by Bullen and wife and Hayward and wife on January 17, 1951. [R. p. 190.]

The jurisdiction of this Court to review the judgment of the District Court is conferred by the provisions of 28 United States Code Annotated, Section 1291.

Statutes Involved.

United States Code Annotated, Title 40.

Section 257. Condemnation of realty for sites and other uses; jurisdiction.

In every case in which the Secretary of the Treasury or any other officer of the Government has been or shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so. And the United States district courts of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the reecipt of the application at the Department of Justice. Aug. 1, 1888, c. 728, Sec. 1, 25 Stat. 357; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167.

Section 258. Same; Procedure.

The practice, pleadings, forms and modes of proceedgings in causes arising under the provisions of section 257 of this title shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such district court is held, any rule of the court to the contrary notwithstanding. Aug. 1, 1888, c. 728, Sec. 2, 25 Stat. 357; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167.

Section 258a. Same; lands, easements, or rights-of-way for public use; taking of possession and title in advance of final judgment; authority; procedure.

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing of said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance and other charges, if any, as shall be just and equitable. Feb. 26, 1931, c. 307, Sec. 1, 46 Stat. 1421.

United States Code Annotated—Title 28.

Section 1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Questions Presented by This Appeal.

1. Whether the judgment of the District Court in dividing the jury award of $194,500.00 into 100 parts instead of into 80.6 parts is contrary to the law and the evidence.

2. Whether the District Court erred in holding that these appellants, The Adamant Company, Walter B. Scoville, Joe Seeple and Harry Wynn, did not have an equitable lien against all moneys allocated from the jury award to the Treasure Company, or its belated assignee, the Reconstruction Finance Corporation.

Statement of the Case.

The Adamant Company established an ownership of 25 per cent participating royalty interests in several leaseholds that were condemned, *and* 25 per cent participating royalty interests in the *gross* production of Treasure Well No. 8, situate upon one of the leaseholds, which interest in gross production under California law becomes an interest in the land.

Walter B. Scoville established an ownership of 17 per cent participating royalty interests in several leaseholds that were condemned, *and* 17 per cent participating royalty interests in the *gross* production of Treasure Well No. 8, situate upon one of the leaseholds, which interest in gross production under California law becomes an interest in the land.

The interests of Adamant Company and Walter B. Scoville were established by a certain contract dated April 5, 1938, between Treasure Company, the Adamant Company and Walter B. Scoville, pertaining to said leaseholds and by certain written assignments executed by Treasure Company to each of them.

Said parties further established their interests of 25 per cent and 17 per cent respectively by reason of a certain judgment rendered in the Superior Court of the State of California in and for the County of Los Angeles on or about the 27th day of November, 1940, which adjudged in part as follows:

> "* * * The Adamant Company and Walter B. Scoville, and their assigns, are entitled to retain their respective interests in said lease hereinbefore described, upon which said Well, 'Treasure No. 8' is

drilled, to-wit: 25 per cent therein to the Adamant Company, a corporation, and 19 per cent therein to Walter B. Scoville, both of which interests are subject to any assignments made, and subject to their pro rata share of the completion, operation and maintenance costs and charges of said well." [Jury Trial Ex. E, R. p. 449.]

That Harry Wynn established his ownership of 6 per cent participating royalty interest in certain of the leaseholds being condemned by reason of assignments to him of such per cents by the Treasure Company, as set forth in the written documents [Exhibits H, I, J, K, L, R. pp. 449-450], *and* a 6 per cent participating royalty interest in the *gross* production of Treasure Well No. 8 situate upon one of the leaseholds which interest in *gross* production under California law becomes an interest in the land.

The evidence, by stipulation, before the jury established that there were 80.6 per cent working interests in Treasure Well No. 8, and that there were 19.4 per cent landowners' interests in Treasure Well No. 8. [R. p. 746.]

The *form* of the jury verdict was prepared *by the Government,* the plaintiff herein, and so far as the working interests in Treasure Well No. 8 are concerned the jury's verdict read as follows:

> "H-1. W-I, being the total working interests in Treasure Well, Treasure No. 8 . . . $194,500.00." [R. p. 71.]

The evidence before the jury was that Treasure Well No. 8 from the time it had been placed upon production until it was seized by the plaintiff in this condemnation action had produced petroleum products which had sold

for over $205,000.00. [Jury Trial Rep. Tr. p. 778, lines 14-19; R. p. 697.]

By stipulation before the Honorable Harry C. Westover at the hearing on the question of the allocation of the funds awarded by the jury, it was stipulated that Treasure Well No. 8 had produced petroleum products during the time it was placed on production until it was seized by the Government in an amount that sold for $205,411.68, and that Treasure Company had handled these funds. [R. p. 1235.] No part of said income was paid to the Adamant Company, Walter B. Scoville, Joe Seeple or Harry Wynn, except the sum of $88.54 paid to Harry Wynn in April of 1939.

This appeal followed to have the issues determined in this Court.

Specification of Errors.

I.

These appellants maintain that since the jury award of $194,500.00 was for only 80.6 working interests, that the District Court should have divided the award into 80.6 parts and distributed twenty-five times that amount to the Adamant Company; sixteen times that amount to Walter B. Scoville (or Joe Seeple) and six times that amount to Harry Wynn.

The District Court erred in dividing the jury award into 100 parts, and thereby *decreased our* holdings by approximately 20 per cent.

II.

Our second Specification of Error is that the District Court erred in not granting these appellants an equitable lien against funds from the jury award which were to be distributed to Treasure Company, or its belated assignee the Reconstruction Finance Corporation.

In 1943, and *before* the Reconstruction Finance Corporation had taken, by written assignment [see Adamant, *et al.,* Exhibit 1—Feb. 23, 1950], the interests of Treasure Company in the leaseholds and in the subsequent condemnation award, the Adamant Company, Walter B. Scoville and Harry Wynn filed their answer in the case at bar and alleged a lien against the leasehold and moneys to be allocated to the Treasure Company because of the fact that the Treasure Company, during the time of producing the oil well had *failed to pay to* these holders of participating royalty interests any portion of the income from the production of said well, and that said Treasure Company and its President, Mr. de Bretteville, had handled all of the funds derived from the production of the well.

Under the California laws a recipient of oil royalties has an interest in the land so long as his right to royalty continues.

ARGUMENT.

The appellants, Adamant Company, Walter B. Scoville, Joe Seeple and Harry Wynn were gratified with the manner and dispatch exhibited by the Honorable Harry C. Westover in his conduct of the hearing pertaining to the allocation of the funds of $194,500.00, which was the amount of the jury award for the "working interests of eighty and six-tenths (80.6%)" in Treasure Well No. 8.

We contend that on two matters only Judge Westover is in error and we believe this Honorable Court of Appeals can correct those errors without the necessity of a new trial.

The Judge was thinking of the proper allocation among the litigants of the jury award of $194,500.00, *verdict value* of the total working interests of 80 and 6/10ths units in this well.

His error in that regard was in his statement, "What difference does it make if you divide it ($194,500.00) into 100 parts or 80.6 parts?"

The difference is that such a division into 100 parts decreases the award belonging to Adamant Company, Walter B. Scoville, Joe Seeple and Harry Wynn by 20 per cent, which is contrary to the verdict of the jury.

This error is discussed under Point I hereinafter.

* * * * * * * * *

We believe Judge Westover considered the question of our equitable lien upon the funds from this jury award which belonged or was to be allocated to Treasure Com-

pany (or its belated assignee Reconstruction Finance Corporation) as strictly a legal matter, which it might be well to pass to this Circuit Court of Appeals for decision.

Our interest of 47 per cent ownership of total production of the well was established by documentary evidence.

The total production of the well prior to seizure was *stipulated* by all parties to be $205,411.68.

The answer filed by these claimants pleaded their right to an equitable lien both in percentages and in sums of money and alleged the production figure of $205,411.68.

The Reconstruction Finance Corporation's own expert witnesses testified to the cost of the operation of the well —which costs we conceded should be deducted from the gross production as operating expenses chargeable against the total working interests.

There is clearly a right in these claimants to an equitable lien upon any funds to be allocated to the former lessee and operator, the Treasure Company or its belated assignee, Reconstruction Finance Corporation.

This question is discussed under Point II hereinafter.

POINT I.

MATHEMATICAL ERROR OF TRIAL COURT.

The Jury's Award Was Based Upon Eighty and Six-Tenths—One Per Cent Working Interests of the Leasehold Upon Which Treasure Well Was Drilled Because There Were Only Eighty and Six-Tenths—One Per Cent "Working Interests" in Treasure Well No. 8.

In view of the fact that there was a total of only eighty and six-tenths (80.6)—one per cent "working interests" in Treasure Well No. 8, the award of $194,500.00 should be *divided* into eighty and six-tenths sums of money and allocated to the owners of said one per cents in accordance with the number of one per cents owned by each claimant.

The Trial Court Erred in Dividing the Jury Award Into 100 Parts Instead of Into 80 and 6/10 Parts or Units.

The exact wording of the jury's verdict and award pertaining to Treasure No. 8 leasehold was, as follows:

"H-1

W-I being the total working interests in Treasure Company Well Treasure No. 8 $194,500.00"

[R. p. 65.]

The evidence before the jury, by stipulation, established the fact that "the total working interests in Treasure Company Treasure Well No. 8" was only 80 and 6/10 interests, units or parts and *not* one hundred interests, units or parts. [R. p. 746.]

The landowners' interests were fixed also by stipulation at 19 and 4/10ths parts, or units or interests. [R. p. 746.]

The question of the valuation of the said landowners' interests was *withdrawn* from the jury *before the verdict was rendered.*

Since 100 per cent represents the total leasehold or the total production, and the landowners' portion of 19 and 4/10 per cent of said total valuation of the production and of the leasehold was *withdrawn* from the consideration of the jury, it is *clearly erroneous to hold that the jury's verdict covered 100 per cent valuation of the leasehold.*

It is also error for the trial court to hold that working interests of eighty and 6/10 constituted the *total* leasehold.

Since Adamant Company, Walter B. Scoville, Joe Seeple and Harry Wynn were the combined owners of 47 working interests out of the total of 80 and 6/10 working interests hence they are entitled to $\frac{47}{80.6}$ of $194,500.00, or $113,418.05.

* * * * * * * * *

The jury award of $194,500.00 divided by 80 and 6/10 equals $2,413.15 which is the value of *one* working interest.

(The lessee of an oil lease never owns 100 per cent of the leasehold because his 100 per cent *is diminished* by the percentages *retained* by the landowner. This appears self evident.)

IT IS ERROR TO FORCE AN OWNER OF A 1 PER CENT WORKING INTEREST, OUT OF A TOTAL OF 80.6 PER CENT WORKING INTERESTS, TO ACCEPT ONE ONE-HUNDREDTHS OF THE JURY AWARD INSTEAD OF ONE ONE-EIGHTIETH AND SIX-TENTHS PER CENT OF THE JURY AWARD.

We do not believe our opponents dispute the above figures of eighty and six-tenths (80.6) lessee's interest and nineteen and four-tenths (19.4) landowners' interest, making a total of 100 per cent, which constitutes the full leasehold.

Furthermore the jury award speaks for itself and states "total working interests." It does *not* state total *landowners and* working interests combined.

Nor does the jury award state total leasehold interests.

The Trial Court Found as Follows:

"XIV.

The jury's verdict of $194,500.00 established the value of the *lessee's* interest in the Fletcher Lease, Lots 9, 10 and 11, Block 33, Tract 9809, under which Treasure Well No. 8 was located." (Emphasis added.) [R. p. 140.]

This Finding is conclusive to the effect that only "the lessee's interest" was covered by the jury's award.

The lessee's interest was only 80.6 per cent of the leasehold.

Since the jury award was not based on a 100 per cent leasehold interest and value but only upon 80.6 per cent of the leasehold the following Finding XIX is *in*correct:

"XIX—The Adamant Company is entitled to 25 per cent of the jury award, which sum stands in place of the leasehold." [R. p. 143.]

This said Finding should be corrected to read as follows:

"The Adamant Company is entitled to $\frac{25}{80.6}$ per cent of the jury award."

Conclusion X [R. p. 153] must be changed to comply with these corrected figures and, of course, Paragraph II of the Judgment [R. p. 155] must be changed accordingly.

The Government Expert Witnesses Parcelled the Leasehold Into "Working Interests" and "Landowners Interests" and Opined Two Separate and Unrelated Valuations Before the Jury.

John H. Dodge, the principal expert witness used by the Government in placing the value on Treasure Well No. 8 testified as follows:

> "Q. Mr. Weymann: Can you give us what, in your opinion, is the *total working interest—value* of the working interest in the Treasure No. 8 Well? A. The total working interest in the Treasure Well No. 8 under conditions of *total royalty* as disclosed by the title search, is $150,830.00. That title search discloses the well *as subject* to a total of 28.7 per cent royalty, and the value which I have given for the working interest is *predicated* upon *that* royalty *being paid.*" [R. pp. 306-307.]

(Later in the trial *when* it was stipulated that the landowners royalty wasn't 28.7 per cent but was really 19.4 per cent this witness raised his appraisal of the value of the "working interests" to $176,314.00.)

Dr. Dodge testified further:

> "Q. Mr. Weymann: When you say the working interests, you include *all* interests in that well *excluding* only the basic landowners royalty and overriding royalties? A. Well, I would say excluding only the 2 landowners royalties—the one to Fletcher and the one to the Herndon Community Lease west of Fabmouth." [R. pp. 307-308.]

Dr. Dodge further testified:

> "Q. Mr. Weymann: I mean the working interest of the total production amounts to how much? A. Well, it amounts to the *difference* between 100 per cent and 28.7 per cent, or 71.3 per cent of the production." [R. pp. 309-310.]

(As heretofore stated, by stipulation, the above per cents were changed to 80.6 working interests and 19.4 landowners interest.) [R. p. 746.]

To eliminate any further doubt that the jury's award of $194,500.00 covered *only 80.6* per cent *of the leasehold* (and of its total production) we call this Court's attention to the fact that the Government's witness, Dr. Dodge, placed a *separate* valuation upon 12.03 per cent *of the production of the well* which belonged to one of the landowners.

Dr. Dodge testified as follows:

> "Q. Mr. Weymann: That landowners royalty to which you have testified, does that go to the whole of G, *or only to the 4 lots in G?* A. The 12.03 per cent accrues to the *whole of G.* In other words, it is a royalty paid to the Community Lease G, *all of the lots* West of Falmouth. It, of course, *excludes Mr. Fletcher's lots* because he was not a member of the Community Lease.

The Court: And that landowners interest of G, you value at $40,340.00? A. That forms the major part of the $40,340.00 value." [R. p. 310.]

* * * * * * * *

In fact, the Government directed the following instruction at the jury trial, which was given by the Court:

"You are instructed that your verdict as to the parcel designated as 'Parcel H-1. W-I' must be predicated on the assumption that the royalty payable from the production of Treasure Well No. 8 is 19.4 per cent and not 28.7 per cent." (Leaving working interest of 80.6 per cent.)

These appellants submit that the jury award of $194,500.00 for the value of the "working interests" could not properly be 100 per cent of the leasehold and hence divided into 100 units as the trial court *erroneously* ruled. The jury award covered only 80.6 per cent of the leasehold and hence the $194,500.00 must be divided into 80.6 units.

The Jury Trial Judge (Not Judge Westover) Informed the Jury That the Government Experts Were Not Placing a Valuation on the 100 Per Cent or the Total Value of Treasure Well but Only Upon the "Working Interest" Portion of the Well.

J. O. SEEPLE

called as a witness on behalf of Defendants The Adamant Company, Walter B. Scoville, and Harry Wynn, being first sworn, was examined and testified as follows * * * [R. p. 451]:

"Q. Have you formed an opinion as to the market value of Treasure Well No. 8 as of September 28th, 1942? A. Yes, I have.

Q. And in your opinion, what is the valuation of Treasure Well No. 8, as of that date? A. From one million to two million dollars.

Q. And you base that on what you have testified to as well as potential production? A. Yes.

Mr. Allen: I think that is all at this time until he marks on the map what he has in mind.

The Court: What does Mr. Seeple have in mind as the basis for his valuation? When Mr. Dodge and Mr. Stolz were on the stand they testified as to a *working interest.* Is that what you have in mind?

Mr. Allen: No, the total 100 per cent value of Treasurer Well No. 8, your Honor.

The Court: *That being different from the other valuations, don't you think that should be given another number if the jury are to use that for valuation purposes?*

I just call that to your attention, Mr. Allen. We have to keep these things so the jury will understand them.

Mr. Allen: Yes, I think that should be designated separately.

The Court: How many parcels are you going to deal with?

Mr. Allen: Two.

The Court: Then suppose we letter them Y and Z.

Mr. Allen: That is satisfactory.

The Court: Very well. We will call it Parcel Y which represents the *total value* of Treasure Well.

Mr. Allen: That is right, your Honor. (512.)"]R. pp. 465-466.]

To Further Emphasize the Mathematical Error of the Trial Court in Its Allocation, We Submit the Following Facts:

The contract of April 5, 1938, which set up the working interests of the parties in Treasure Well No. 8 contained the following provision:

> "It is understood that after providing for landowner and overriding royalties, the issuance of the participating royalties above set forth, and certain other minor issues, which will be requested in said application for permit, first party (*Treasure Company* which the reconstruction Finance Corporation claims as its assignor), will have remaining *approximately 25 per cent* of any production which may be obtained from the above leases." [Ex. "D," Jury Trial, Rep. Tr. p. 492; R. p. 449.]

Under this mathematical error in the *allocation* judgment the Reconstruction Finance Corporation would wrongfully receive 51 per cent *instead* of approximately 25 per cent. *Clearly erroneous!*

It is undisputed that at the time the Government seized possession of this well, on September 28, 1942, the

Adamant Company was the owner of	25	working interests
Walter B. Scoville	16	working interests
Harry Wynn	6	working interests
Bullen & Hayward	2	working interests
Johnson	2½	working interests
Bodkin	1	working interests
Treasure Co.	26.1	working interests
Total	80.6	working interests

The Jury's award of $194,500.00 for eighty and six-tenths working interests amounts to $2,413.15 valuation *of one* working interest, then

The Adamant Company is entitled to 25 times $2,413.15 or.....$60,328.75

Walter B. Scoville is entitled to 16 times $2,413.15 or.....$38,610.40

Harry Wynn is entitles to 6 times $2,413.15 or.....$14,478.90

We submit that Finding XIX, which states that: "The Adamant Company is entitled to 25 per cent *of the Jury award,* which stands in place of the leasehold" [R. p. 143] is a mathematical *error,* as the jury award covered only 80.6 per cent of the leasehold. The Adamant Company is entitled to 25 per cent of 100 per cent *total production* or *total leasehold* and *not* 25 per cent of 80.6 per cent of *production* (or 80.6 per cent of *leasehold*).

In other words the Adamant Company is entitled to $\frac{25}{80.6}$ of the jury award.

* * * * * * * * *

Finding XVI *correctly* quotes that the

> "assignment of participating royalty interests in the leases to the Adamant Company convey to the Adamant Company twenty-five (25) one per cent participating royalty interests in *all* oil, gas and other hydrocarbon substances produced, saved and sold from the following described premises." (Emphasis added.) [R. pp. 140-141.]

(The same language is used in the same Finding pertaining to the interests conveyed to Walter B. Scoville and also to Harry Wynn, designating their *respective percentage* interests in "*all* oil, gas, etc."

Let us take the following example:

The well yields 100 barrels of oil. Under Finding XVI above, the Adamant Company would be entitled to 25 barrels of oil, being twenty-five (25) per cent of "*all* oil."

When the Trial Court arbitrarily placed the value of the "working interest" *portion* of the leasehold *at one hundred* (100) *per cent* and failed to *first deduct* the nineteen and four-tenths (19.4) per cent of the landowners interest, but simply held that the jury's award covered one hundred (100) per cent, the Adamant Company received twenty-five (25) per cent of the jury award, instead of 25 per cent of total production, or, in other words, the Adamant Company only receives twenty (20) barrels of oil on a one hundred (100) barrel production, and *hence is deprived of 5 barrels out of every 100 barrel production.*

There appears to have been a little quirk in the thinking and figures of the Trial Court, as during the course of the hearing the Trial Judge asked: "what difference does it make if we take one hundred (100) per cent or eighty (80) per cent?"

The *difference is,* of course, that it takes from the Adamant Company, Scoville and Wynn approximately one-fifth (1/5) of their interests and hands it to the Treasure Company, or rather, the Reconstruction Finance Corporation, its belated assignee. Treasure Company never owned more than 26.1 per cent of production.

* * * * * * * * *

The Trial Court *correctly* found in Finding XVIII (in part) as follows:

> " * * * Under the contract dated April 5, 1938, and the decision in the case of Scoville v. de Bretteville, both of which as herein referred to, the Adamant Company received a twenty-five (25) per cent participating royalty interest in the *Fletcher lease,* and Walter B. Scoville received a nineteen (19) per cent participating royalty interest in the Fletcher Lease. * * *" [R. p. 142.]

The Finding clearly shows that the Adamant Company had twenty-five (25) barrels out of every one hundred (100) barrels produced on the leasehold, and that Walter B. Scoville had nineteen (19) barrels out of every one hundred (100) barrels produced.

Since the jury award was a valuation of only eighty (80) barrels (80.6 per cent of production) it is incorrect for the Trial Court to set over to the Adamant Company the valuation of twenty (20) barrels and to Walter B. Scoville the valuation of fifteen and 2/10 barrels. Scoville's 19 per cent later reduced to 16 per cent by assignments of 3 per cent.)

We submit that paragraph X of the Judgment [R. p. 153] should be changed in the following particulars:

Adamant Company is entitled to (and not $47,925.00 as adjudged)	$60,328.75
Walter B. Scoville is entitled to (and not $30,672.00 as adjudged)	$38,610.40
Harry Wynn is entitled to (and not $11,502.00 as adjudged)	$14,478.90

This corrected computation divides the jury award which reads as follows:

"H-1

W-I Being the total working interests in Treasure Company Well No. 8 $194,500.00"

among the "total working interests of eighty working interests and six-tenths, and *not* among "*100* working interests" which *latter never existed.*

* * * * * * * * *

All oil leases are owned in at least 2 separate and distinct portions—the lessor's portion of the lease and the lessee's portion of the lease.

In the case at bar the jury's verdict covered *only* the lessee's portion which consisted of 80 and 6/10 working interests.

Conclusion on Point I.

Since the Government expert witnesses testified to the value of the working interest portion of the oil well—since the jury trial judge informed the jury that the Government expert witnesses were not placing a valuation upon the total value or 100 per cent value of Treasure Well—and since the verdict of the jury reads "total working interests in Treasure Well" then the jury award must be divided into 80 and 6/10 working interests or parts and not into 100 parts for the purpose of distribution.

POINT II.

EQUITABLE LIEN ERRONEOUSLY DENIED.

Any and All Sums of Money Allocated to the Reconstruction Finance Corporation as Assignee of Treasure Company Are Subject to an Equitable Lien for All Moneys Which Treasure Company Should Have Paid in Equity and Good Conscience to the Adamant Company, Walter B. Scoville and Harry Wynn, From the Moneys Received by the Treasure Company From the Sale of Oil, Gas and Other Hydrocarbon Substances From Treasure Well No. 8 Up to the Time of the Seizure of the Well by the Government Under This Condemnation Action.

In the appeal in the case at bar we find according to the title that the United States of America is appealing "for the use of Reconstruction Finance Corporation, a Federal corporation."

We also find in its Notice of Appeal that the Reconstruction Finance Corporation is appealing "solely as assignee of the Treasure Company, party-claimant in the above entitled action, * * *"

Since the Reconstruction Finance Corporation's appeal is in two capacities, we are interested at this point of our argument in its capacity *as assignee* of Treasure Company's interest.

The Findings in the case at bar in its preamble contains the following: "and Reconstruction Finance Corporation appearing *solely as assignee* of Treasure Company's interest in the foregoing award by its attorneys, John H. Rice and Julius A. Leetham;" [R. p. 135.]

From the time that Treasure Well was placed on production until the Government took possession of said well, on September 28, 1942, the Treasure Company sold the products of said well and received therefor the sum of $205,411.69. (See stipulation before Trial Court. [R. pp. 1235-1236.])

Even though the Adamant Company, Walter B. Scoville and Harry Wynn owned their respective interests in this production, Treasure Company paid them nothing from the production with the exception of $88.54, paid to Harry Wynn in April, 1939.

Both of the Government witnesses in the case at bar testified to the fact that the cost of the operation of this well should not exceed more than $3.30 a per cent per month.

Harry P. Stolz, a Government expert witness, testified as follows: "* * * and as I previously testified, I used an operating cost of $3,200.00 per year per well." [Jury trial, R. p. 389.]

(Said $3,200.00 amounts to $3.30 per one per cent per month.)

Dr. John F. Dodge, a Government expert witness, testified as follows:

> "However, that became of no importance since the operating charges which we, I should say I—Mr. Sheldon and I, in making this appraisal, assumed to be the operating cost in the future, were below a $10.00 per per cent per month, which created a difference, or at least one of the differences between these various classes of per cents. Our operating costs which we postulated in making our estimate of the future value of this property were *very much less*

than $10.00 per month per cent, which was the breaking line between at least certain classes of these working interests of which you speak. * * * *and is not governed or influenced by any possibly inflated idea of costs that might have been existing in the past."* [Jury trial, R. pp. 336-337.]

Dr. Dodge, Witness, testified further:

"Q. By the way, we never did ask you the exact figure that you allowed for cost per well per year? A. $3,200 per operating well-year.

Q. The same as Mr. Stolz? A. The same as Mr. Stolz." [Jury trial, R. p. 815.]

These appellants submit that since their total interest in this leasehold amounts to 25 per cent, plus 16 per cent, plus 6 per cent, or a total of 47 per cent, that they are entitled to 47 per cent of $205,411.69, or a total sum of $96,543.49, less the cost of operation of the well and less the sum of $88.54 paid to Harry Wynn in April, 1939.

This claim of $96,543.49 (less operating expense) becomes a lien upon any portion of the jury award that is claimed by the Treasure Company or its belated assignee, the Reconstruction Finance Corporation.

"When title to the land vests in the condemnor the lien of the mortgage is transferred to the award."

United States v. Certain Lands, etc., 129 F. 2d 557 (1942) (C. C. A. 2).

"In New York inchoate interests are not destroyed by condemnation but merely transferred to the award: witness dower."

United States v. Lands in Hempstead, etc., 129 F. 2d 918, 919, 920 (C. C. A. 2) (1942).

(In California community property interests takes the place of dower.)

The Treasure Company is forbidden, having failed to remit the earnings of this joint adventure to the royalty holders (less the cost of operation)—to now come into the condemnation action and receive its portion of the jury award *free* and *clear* of the claims of the royalty holders.

No court of equity should *permit such an inequitable act.*

The Treasure Company would thus be taking advantage of its own wrong in failing to pay to the other joint adventurers their profits derived from the operation of the well.

> "(3) *A party to a contract cannot take advantage of his own* act or *omission* to *escape liability thereon.* (17 C. J. S., Sec. 468, p. 966; 12 *Am. Jur.,* Sec. 381, p. 957.) Where a party to a contract prevents the fulfillment of a condition precedent or its performance by the adverse party, he cannot rely on such condition to defeat his *liability.* (*Bewick v. Mecham,* 26 Cal. 2d 92, 99 (156 P. 2d 757, 157 A. L. R. 1277); Pacific Venture Corp. v. Huey, 15 Cal. 2d 711, 717 (104 P. 2d 641); Crane v. East Side Canal etc. Co., 6 Cal. App. 2d 361, 367 (44 P. 2d 455); Carl v. Eade, 81 Cal. App. 356, 358 (253 P. 750);"
>
> *Paul Overton v. The Vita-Food Corporation, a corporation,* 94 Cal. App. 2d 367-371, 210 P. 2d 757 (Oct., 1949).

"(6b) *By making the appraisal impossible,* defendant prevented the determination of the purchase price by the method contemplated by the contract. Defen-

dant's obvious purpose was to make the contract inoperative and to prevent plaintiff from seeking specific performance after the price was determined by the appraisers. (8) *A party who prevents fulfillment of a condition of his own obligation commits a breach of contract* (Alderson v. Houston, 154 Cal. 1, 13 (96 P. 884); Pacific Venture Corp. v. Huey, 15 Cal. 2d 711, 717 (104 P. 2d 641); Carl v. Eade, 81 Cal. App. 356, 358 (253 P. 750); Rest., Contracts, §315) *and cannot rely on such condition to defeat his liability.* (Pacific Venture Corp. v. Huey, *supra*; Carl v. Eade, *supra;* 13 C. J. 647; 17 C. J. S. 966; 12 Am. Jur. 885.)"

Bewick v. Mecham (1945), 26 Cal. 2d 92, 156 P. 2d 757; 157 A. L. R. 1277.

Equitable principles require that any moneys due to the Treasure Company and Mr. de Bretteville, its president and manager, should be applied upon this equitable lien by reason of their misconduct and failure to pay to these appellants their just proportion of the income from this producing well.

To permit the Reconstruction Finance Corporation to retain these funds as a belated assignee of Treasure Company is to place the stamp of approval upon the unfair and unjust operation of this oil venture by Treasure Company.

The Reconstruction Finance Corporation is not a bona fide assignee for value without notice of these appellants' claims pertaining to their just proportion of the income. *The Reconstruction Finance Corporation had full notice of our equities.*

The Plaintiff, Reconstruction Finance Corporation Was Placed on Notice That the Adamant Company, Walter B. Scoville, and Harry Wynn Claimed a Lien Against Any Moneys to Be Paid to the Treasure Company by Reason of This Condemnation Suit Five and One-half Years Before It Acquired the Interest of Treasure Company by the Contract and Assignment Dated May 31, 1949. [Adamant et al., Ex. 1.]

On or about December 8, 1943, these appellants filed an Answer in the case at bar, and in said Answer set forth their equitable *lien* in the following words:

Paragraph XI of the first defense alleged in substance as follows:

> "That Treasure Well No. 8 has produced oil and gas from on or about the 15th day of December, 1938, to September 28, 1942, of the value of over $205,411.68, and said Adamant Company has thereby acquired a further interest in the said leaseholds of the value of $51,452.92, being 25 per cent of said production value." [R. pp. 19-20.]

The Second Defense in Paragraph V thereof alleges the above production of $205,411.68 and then states:

> "that said Walter B. Scoville has thereby acquired a further interest in the said leasehold of the value of ($34,919.98) being 17 per cent of said production." [R. p. 21.]

(A typographical error alleged $14,378.82 instead of the correct figure of $34,919.98—the 17 per cent however was alleged, making it a matter of mathematical calculation to arrive at the correct figure in dollars and cents.)

The Third Defense in said Answer alleged the above production and then stated that:

> "the said Harry Wynn has thereby acquired an interest in said leaseholds of the value of $10,270.58, being 5 per cent of said production value." [R. pp. 22-23.]

The Adamant Company, Walter B. Scoville, Joe Seeple and Harry Wynn have received no moneys from Treasure Company or G. de Bretteville from the production of Treasure Well No. 8, excepting one check of $88.54 paid to Harry Wynn in April of 1939.

These defendants have an equitable lien and claim against the moneys awarded by the jury as compensation for the taking of the leasehold by the Reconstruction Finance Corporation in the total sum of $96,543.35 in addition to their claims of $60,328.75, $38,610.40 and $14,478.90 as *owners* of working interests in Treasure Well No. 8.

These defendants further submit that at the time the Reconstruction Finance Corporation and the Southern California Gas Company agreed to assume the liability of Treasure Company as set forth in the contract of May 31, 1949 [Adamant *et al.,* Ex. 1—February 23, 1950], they had *full notice* of the above claims as set forth in our Answer filed December 8, 1943, approximately five and one-half years previous to this assumption of liability by the Reconstruction Finance Corporation.

Reconstruction Finance Corporation Under the Law of California, Which Governs in Condemnation Suits, Is Obligated to Pay Adamant Company, Walter B. Scoville and Harry Wynn All Moneys Due Them Upon Their Equitable Lien Against That Portion of the Jury Award Which Belonged to Treasure Company, or Its Assignee, the Reconstruction Finance Corporation.

"The payment of royalties out of a production of an oil well is a continuing obligation, and the recipient of those royalties has an interest in the land so long as her right to royalty continues." (Citing *La Laguna Ranch Co. v. Dodge,* 18 Cal. 2d 132, 114 P. 2d 351.)

Recovery Oil Company v. Van Acker, 96 Cal. App. 2d 909-912 (April, 1950) (Supreme Court denied hearing June 8, 1950).

On September 28, 1942, the plaintiff, Reconstruction Finance Corporation, in this action seized possession of a producing oil well, and hence was immediately placed on notice that there must be outstanding royalty interests and that if the owners of those royalty interests had not received their just proportion from *its production* they continued to have a *vested interest* in the property or *leasehold* until such time as they are fully paid their share of the production.

Furthermore, as noted above, *these claimants* in their Answer, set forth the fact of their title and interest in this production which constituted an *interest in the land* and the payment for which had not been received by them.

The Owner of a Royalty Interest Has an Interest in the Real Property, and Such Interest Vests in Such Owner as an Estate Until Such Time as Such Owner Has Received Payment on His Royalty Interest.

We quote from *Recovery Oil Company v. Van Acker,* 96 Cal. App. 2d 909 at page 912, as follows:

> "Any obligation to pay was not only a continuing one but she had an interest *in the land,* which did not terminate until she actually received that amount of money. Her interest was vested as an estate and not as a lien. Her position was similar to that of a holder of a trust deed. The Appellant, taking with notice, was in no position to demand relief in a Court of Equity as against the respondent, without recognizing and assuming the obligation which thus continued to exist." (Supreme Court denied petition for hearing June 8, 1950.)

The Federal Judicial Procedure in Eminent Domain Lies Partly in Equity and Partly in Law.

> "Federal Judicial Procedure in this field lies partly at equity and partly at law. (Searl v. School District 124 U. S. 197, 199, 8 S. Ct. 460, 31 L. Ed. 415."
>
> *Welch v. Tennessee Valley Authority* (1939), 108 F. 2d 95-98 (Certiorari denied, 1940).

> "The award stands in the place of the property. Washington Water Power Company v. United States, 9 Cir., 135 F. 2d 541. The question must be determined on the basis of *equity* and *justice.* Cobo v. Tennessee Valley Authority, 6 Cir., 108 F. 2d 95; Welch v. Tennessee Valley Authority, 6 Cir., 108 F. 2d 95."
>
> *United States v. Alberts, et al.* (1945), 59 Fed. Supp. 298, 299.

It seems clear that not only are these claimants entitled to receive in the condemnation suit the value of their interests, based upon the *potential* production of the well at the time that the Government took possession of same, which values were testified to by Government experts, but these claimants *are also entitled to an equitable lien against the property for the amount of money due them under their royalty interests.*

This equitable lien attaches to the funds *substituted* for the land and now in the possession of the Registry of the Court, and which the Reconstruction Finance Corporation claims as a *belated assignee* of Treasure Company.

The evidence sustains the right to an equitable lien contrary to the second paragraph of Finding XXVIII. [R. p. 147.]

JOINT ADVENTURE ALONE ESTABLISHES AN EQUITABLE LIEN.

An Equitable Lien Is Established Against the Funds Awarded by the Jury in Its Verdict for the Taking of Treasure Well No. 8 Leasehold and in Favor of These Appellants by Reason of the Fact That the Completion, Maintenance and Operation of Said Leasehold Was a Joint Adventure, According to a Final Judgment of the Superior Court of the State of California.

The Findings of the Superior Court of Los Angeles County in the case of Walter B. Scoville, Joe Seeple, Harry Wynn and the Adamant Compony against G. de Bretteville and Treasure Company, defendants, contained a Finding reading, in part, as follows:

> "* * * and a charge against the *joint adventure* of plaintiffs and defendant, Treasure Company, in connection with the completion, maintenance and *oper-*

ation of said well 'Treasure No. 8.'" [Finding XXI (a)(6)—Jury Trial, Rep. Tr. p. 493; Ex. "E."; R. p. 449.]

It is axiomatic that the property of a joint adventure is held and is subject to a trust for the benefit of all parties to such joint adventure.

Such property cannot be taken in condemnation without accounting to all members of the joint adventure, not only as to their title in the property but also as to any *lien* they have upon the *entire title.*

As between the parties to a joint adventure one of them who makes advances for the promotion of the venture may have a claim or lien therefor *on the property of the adventure,* which is similar to a partner's lien. (30 Am. Jur., Sec. 30, pp. 692-693. Notes 15 and 16.)

The Supreme Court of California recently reiterated the fundamental rights of joint adventurers *in the property* belonging to the adventure as follows:

> "(1) Where the evidence clearly shows the parties' intention to engage in a joint enterprise for profit it has been held that the principles governing joint venture apply irrespective of how title to the property is taken. (McNab v. Mills, 199 Cal. 231 (248 P. 657); Bastjan v. Bastjan, 215 Cal. 662 (12 P. 2d 627); Swartout v. Gentry, 62 Cal. App. 2d 68 (144 P. 2d 38.) (2) Each coadventurer or partner is a trustee for the other and *neither* may reap a personal *pecuniary advantage* from the use of the partnership property. (Perelli-Minetti v. Lawson, 205 Cal. 642, 647 (272 P. 573); Nelson v. Abraham, 29 Cal. 2d 745, 751 (177 P. 2d 931).)" (Emphasis added.)
>
> *Larson v. Thoresen* (February, 1951), 36 Cal. 2d 666, 226 P. 2d 571.

These claimants and appellants submit that since the Treasure Well No. 8 leasehold was *property belonging* to the joint adventure, as held by the Superior Court of Los Angeles County in its Judgment (referred to in the Findings in the instant case as the Vickers Judgment) that the property so condemned *is subject* to the claims of these appellants for moneys due them *out of the production* of the property, which moneys were never paid to them by Treasure Company.

Since the Reconstruction Finance Corporation took an assignment from the Treasure Company of all its right, title and interest in the joint adventure, and in view of the fact that it was then informed of the contents of the Answer filed by these claimants, of these existing claims, said Reconstruction Finance Corporation is *in no better position than Treasure Company,* and all moneys due under this award are subject to the rights of these claimants and appellants to the full extent of the production of $205,-411.69 less operating expenses of $3.30 per one per cent per month for a period of 3 years and 9 months prior to the seizure in this condemnation action on September 28, 1942.

These appellants owned 47 per cent of the production—47 per cent of $205,411.69 equals $96,543.49—47 multiplied by $3.30 equals $155.10 which sum is the *monthly* operation charge against these appellants. 45 months (3 years and nine months) operation charge amounts to $6,979.50. Deducting this operation charge from $96,543.49 leaves *$89,563.99, the net amount of the equitable lien aganist the funds belonging to Treasure Company or* its belated assignee, the Reconstruction Finance Corporation.

In *Ketchum v. St. Louis,* 101 U. S. 306, the United States Supreme Court affirmed a judgment declaring an *equitable lien or* charge upon the earnings of the Pacific Railroad of Missouri as prior and paramount to any mortgage or other lien thereon, to the extent of $4,000 per month, payable monthly, and $1,000 payable in each month of December to meet the interest upon $700,000 of bonds issued by the County of St. Louis and by it loaned to the Pacific Railroad Company, such payment to continue until the bonds were fully paid by the company.

The decree declared the lien to exist and to be enforcible upon the railroad property and franchises, against the funds in the hands of the receiver in this suit, as well as the purchaser, under the mortgage foreclosure sale to be hereafter referred to.

The opinion of the Supreme Court read, in part, as follows:

> "The learned Judge who heard this cause in the circuit court rested the decree upon the proposition of law, that 'if a debtor by a concluded agreement with a creditor sets apart a specific amount of a *specific* fund in the hands, or to come into the hands of another from a designated source, and directs such person to pay it to the creditor, which he assents to do, this is a specific appropriation binding upon the parties and *upon all persons with notice who subsequently claim an interest in the fund* under the debtor.
>
> * * * * * * * *
>
> "We are of the opinion that no insuperable obstacle exists in the way of a court of equity giving effect to this agreement or contract between the parties as against those whom the law charges with *notice thereof.* The relief granted by the decree seems to

be in accordance with the established rules in such cases.

"In *Legard v. Hodges,* Lord Thurlow said: 'I take this to be a universal maxim, that wherever persons agree concerning any particular subject, that, in a court of equity, as against the party himself, and any claiming under him involuntarily, or with *notice, raised a trust.* These persons have so claimed; and, therefore, this is a pure trust estate,' and they must be declared trustees. 1 Ves., Jr. 478. In the report of that case in 3 Bro. Ch. 531, the Chancellor says: 'I take the doctrine to be true, that when parties come to an agreement as to the produce of land, the *land itself* will be affected by the agreement.' Upon rehearing, the former decree was affirmed. 4 Bro., Ch. 422.

"In re Strand Music Hall Co., 3 DeG., J. & S., 147, the question arose whether that company had created a valid charge on their real property. 'There can, I think,' said Lord Justice Turner, 'be no doubt that it was intended by these agreements to create a charge upon the property of the company, but it was said on the part of the official liquidator that this intention was not well carried into effect. I apprehend, however, that where this court is satisfied that it was intended to create a charge and that the parties who intended to create it had the power to do so, it will give the effect to the *intention,* notwithstanding any mistake which may have occurred in the attempt to effect it."

The doctrine is thus stated by Mr. Justice Story in his Equity Jurisprudence, Vol. II, Sec. 1231:

"Indeed, there is generally no difference in equity in establishing a lien, not *only on real estate,* but on personal property, or on money in the *hands of a third*

person, wherever that is a matter of agreement, at least against the party himself, and *third persons* who are volunteers or *have notice;* for it is a general principle in equity that as against the party himself, and any claiming under him voluntarily or with notice, such an agreement raises a trust."

The author cites, in support of these views, *Legard v. Hodges* (*supra*).

So, also, in *Pinch v. Anthony,* 8 Allen 536:

"It is well stated that a party may, by express agreement, create a charge or claim in the nature of a lien on real as well as on personal property of which he is the owner or in possession, and that equity will establish and enforce such charge or claim, not only against the party who stipulated to give it, but *also against third persons* who are either volunteers or who take the estate on which the lien is agreed to be given, with notice of the stipulation. Such agreement raises a trust which binds the estate to which it relates, and all who take title thereto with notice of such trust can be *compelled in equity to fulfill it.*"

In the recent work of Mr. Jones on Mortgages, Vol. I, section 162, the author remarks:

"In addition to these formal instruments which are properly entitled to the designation of mortgages, deeds and contracts, which are wanting in one or both of these characteristics of a common law mortgage, are often used by parties for the purpose of pledging

real property, or some interest in it, as security for a debt or obligation, and with the intention that they shall have effect as mortgages. Equity comes to the aid of the parties in such cases, and gives effect to their intentions. Mortgages of this kind are, therefore, called *equitable* mortgages."

So, also, in his treatise in Railroad Securities, p. 57, the same author says:

"An agreement of a company to set apart specific earnings or property in the hands of a third person to meet the interest or principal of its bonds, creates an equitable lien or charge."

Willard, Eq. Jur. 462;

Watson v. Wellington, 1 Russ. & M. 604;

Yeats v. Groves, 1 Ves. Jr., 280;

Lett v. Morris, 4 Sim. 607;

Ex parte Alderson, 1 Madd. 53.

"Further citation of authority would seem to be unnecessary. If any doubt exists as to the case coming within these recognized principles of equity, it is sufficient to say that the appropriation of the earnings of the Railroad Company as security for the loan by the County was in pursuance of a special Act of the Legislature; and in sustaining the decree below we give effect to the legislative will as to matters over which its authority unquestionably extended.

* * * * * * * *

"Nor could parties who claim under subsequent incumbrances, and who are chargeable with notice of the appropriation made by the Act of 1865, destroy the equitable lien of the County, even with the consent of the Railroad Company. With the lien the property

itself was chargeable by whomsoever it *or the funds accruing therefom are or may be held.*" (Emphasis added.)

Ketchum v. St. Louis, 101 U. S. 306.

In the case at bar equity will enforce the lien against the *property* or the *funds* substituted for the property in the eminent domain proceedings.

"When a lien upon land for improvements is claimed and the property is conveyed to an assignee for the benefit of creditors and then under an agreement between the assignee and the lien-claimant, the property is sold by the assignee and the moneys deposited to await an adjudication of the rights of the parties a *court of equity* will entertain jurisdiction and *enforce* the lien against the funds—the sale price of the property—in lieu of the lien against the property."

Lockett v. Robinson (1893), 31 Fla. 134, 12 So. 649, 20 L. R. A. 67.

In the case at bar the claim against the production funds and the resultant lien against the well and leasehold are transferred to the funds awarded by the jury as the value of the property and leasehold.

Conclusion on Point II.

We submit that the trial court erred in denying Adamant Company, Walter B. Scoville, Joe Seeple and Harry Wynn an equitable lien against all moneys of the jury award belonging to Treasure Company or its belated assignee, Reconstruction Finance Corporation.

GENERAL CONCLUSION.

Point I.

The Adamant Company is entitled to 25/80.6 of the jury award of $194,500.00 being the sum of $60,328.75.

Walter B. Scoville is entitled to 16/80.6 of the jury award of $194,500.00, being the sum of $38,610.40.

Harry Wynn is entitled to 6/80.6 of the jury award of $194,500.00, being the sum of $14,478.90.

The above figures compensating them for their ownership of the respective stated percentages in the leasehold upon which Treasure Well No. 8 was drilled.

Point II.

The Adamant Company, Walter B. Scoville and Harry Wynn have an equitable lien against all sums of money to be allocated to the Treasure Company or its belated assignee, the Reconstruction Finance Corporation, to the extent of 47 per cent of $205,411.68, amounting to $96,-543.35, less the operating charge of $6,979.50 (which the Government witnesses testified was a sufficient operating charge), or a net equitable lien of $89,563.99.

Respectfully submitted,

LELAND J. ALLEN,

Attorney for Appellants, The Adamant Company, Walter B. Scoville, Joe Seeple and Harry Wynn.